VIJE & CO.

v.

THE CO-OPERATIVE CENTRAL BANK LTD.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[ORIGINATING SUMMONS NO. D3-24-39-89]
21 MARCH 1991

STATUTORY INTERPRETATION : *Monies held in solicitor's account - Whether "trust money" or "client's money" - Solicitors Account Rules 1978, rr. 7(a)(i), (b), 15.*

LEGAL PROFESSION: *Solicitor's client account - Money held - Whether "client's money" or "trust money" - Instructions from defendant - Loan documentation for employees of bank - Provision that borrower liable for legal expenses and charges - Failure to pay - Bills raised against bank - Dispute - Taxation - Limitation period for disputing bill of costs - Legal Profession Act 1976, ss. 126, 128, Pt IX - Solicitors Account Rules 1978, rr. 7(a),(b), 15.*

TRUSTS: *Monies held in solicitor's trust account - On whose behalf - "Trust money" or "client's money" - Solicitors Account Rules 1978, rr. 7(a),(b), 15.*

The plaintiffs, V, are a firm of solicitors who had performed work for the defendant, CCB, in the areas of litigation, professional advice and opinion and preparation of loan documentation for employees of CCB (which was subsequently placed in receivership). There was a sum of RM317,562 (the said sum) standing to the credit of CCB in V's client account with CCB. In August 1988, after notifying CCB, V withdrew a sum of RM231,101.25 which it claims were fees owing to V by CCB. In February 1989, V withdrew the remaining sum of RM86,460.75 in purported satisfaction of further amounts said to be due from CCB to V. A declaration is now sought by V that the said drawings were in order and if not, that V was in any event entitled to a lien or set-off in respect of the said sum.

Although a settlement was reached between V and CCB in relation to the litigation bills, there was no evidence of any agreement as to V's right to draw on the money.

V had prepared loan documentation for C, S, T and M who were employees of CCB. As instructed by CCB, V included in the loan agreement, a provision to the effect that the borrower would be responsible for all fees payable thereof. In addition, in relation to C, T and M, the letter of instructions to V contained a paragraph which specified that CCB shall not be liable for any fees unpaid and due for any reason in relation to the preparation of the loan documentation (the said paragraph); there was no such paragraph in relation to S.

V raised bills against the borrowers but as these were not paid, V then raised the bills against CCB for RM163,597.25 for the preparation of the loan documentation.

V contends that they were entitled to bill CCB for the work done, notwithstanding the fact that it was specified in the loan agreement and the letter of instruction that the borrower was to be liable for the legal fees. Further, V contended that it was entitled to recover the relevant fees from CCB as it was CCB who had given the instructions to V in respect of the work that was to be done and which was done. The receivers of CCB contended that while CCB is liable for the work done, they had at all material times disputed the quantum of the bills. Further, that since it was made abundantly clear to V that the borrowers were to be responsible for the fees involved, it was not relevant whether or not CCB had disputed the bills.

V had acted as solicitors for a developer D who owed CCB money. Purchasers who had entered into agreements with D borrowed money from the government and this amount, which totalled RM317,562 was paid to V by the government to be paid to D towards the purchase price of the houses bought by the purchasers. D then directed V to pay the said sum to CCB upon certain undertakings.

V submitted that under r. 7(a)(iv) of the Solicitors Account Rules 1978 (the Rules), the drawings made by them were in order and that alternatively r. 15 allowed them the right to draw the amount.

The receivers contended that the whole of the money standing to the credit of CCB in V's account was "trust money" to which r. 7(b) applies and that the purported application of the amount invoking r. 7(a)(iv) was not in order.

Held:

[1] Applying ss. 126 and 128 and Pt IX of the Legal Profession Act 1976 (the Act), it is clear that neither CCB nor the receivers are entitled at this late stage to dispute the quantum of the said bills in respect of the litigation nor the bills in relation to the opinion and advice.

[2] In relation to C, T and M, it would seem that on the face of it, taking into account the letter of instruction to V, that as V had relied on the assurance by CCB that their fees would be paid by the member, in the event of failure by the member to pay the relevant fees, V would be perfectly entitled to look to CCB to pay their fees for the work which was done on the instructions of CCB; however, the inclusion of the said paragraph means that CCB is giving clear notice to the solicitors to look for their fees only from the borrower and that if they chose to undertake the job, it must be assumed that they did it on the terms that they are not entitled to look to CCB for the legal fees.

[3] However, as a result of the omission of the said paragraph in the letter of instruction from CCB to V, the bill of costs in respect of the work done in respect of the loan to S was properly raised against the bank. Sections 126 and 128 of the Act have no relevance where the solicitor raises a bill that he was not entitled to raise but do preclude the receivers and CCB from questioning the quantum of the bills raised in respect of the work done for the loan of S.

[4] Under rr. 7(a), (b) and 15, all money held in a client account of a solicitor (apart from money to which the solicitor himself or one or more of the partners is entitled to) is money held in trust by the solicitor in the sense that he is not the beneficiary of the money; however, the exclusion in r. 7(a) to the definition of "client's money" and the definition of "trust money" for the purposes of the Rules have the effect that only money which does not fall within the definition of "client's money" and which is subject to a trust is to be regarded as "trust money".

[5] It is only money held or received on account of trustees of a trust of which the solicitor is solicitor trustee that are excluded from the definition of "client's money" - if money even though held in trust is not excluded as aforesaid, because of the definition of "client's money", it will not come within the meaning of "trust money" as "trust money" is defined not to include "client's money".

[6] When the undertakings were given, the said sum was deemed to be held or received by V on account of CCB and it was clearly held or received in connection with V's practice as solicitors within the meaning of the definition of "client's money" in the Rules; at that stage the amount stood as credited to CCB in V's client account within the terms of r. 15.

[7] Applying the definitions of "client's money" and "trust money" as contained in the Rules and the White Book, the said sum, even if it may have been "trust money" when it was initially paid to V by the government, metamorphosed into "client's money" when it was deemed to be held to the credit of CCB.

[8] Therefore, even though the beneficiary of the money was CCB, V had the right, under r. 15, in respect of fees owed by CCB, to set-off against the money standing to CCB's credit. In this context, setting-off refers to the right of setting-off the amount owed against the amount held and means the settling of the account between the parties and can be implemented by drawing on the account as was done in this case.

[9] The appointment of the receivers and the order of the Court giving directions to the receivers, not being retrospective in effect, have no relevance to the issues here as they came into existence well after V had withdrawn the monies.

[Order accordingly.]

Legislation referred to:
Legal Profession Act 1976, ss. 126, (1), 128, (2), Part IX
Solicitors' Account Rules 1978, rr. 7(a)(iv), 7(b), 15

Other source referred to:
White Book 1979 Vol. 2, paras. 3759, 3763

For the plaintiff - Joginder Singh; M/s. Joginder Singh & Co.
For the defendant - Patrick Chen; M/s. Rashid & Lee

JUDGMENT

VC George J:

En. P. Vijendran practises as an advocate & solicitor under the name and style of Vije & Co. who are the plaintiff in this originating summons which was issued on 23 February 1989. The defendant Co-operative Bank was placed under receivership on 7 March 1989 and two partners of the firm of accountants, Hanafiah Raslan Mohammed & Co., were appointed receivers and managers. There was standing to the credit of the defendant in the plaintiff's client account an amount of RM317,562. On or soon after 2 August 1988 the plaintiff, after giving written notice to the defendant that they were going to do so, drew RM231,101.25 out of the said amount and applied that amount in satisfaction of amounts said to be owing to the plaintiff from the defendant in respect of fees for work done. On or soon after 17 February 1989, the balance amount of RM86,460.75 held in favour of the defendant was also, after a similar notice, drawn in purported part satisfaction of further amounts said to be due from the defendant to the plaintiff as fees.

By this originating summons the plaintiff seeks declarations to the effect that the said drawings were in order and if not that the plaintiff is in any event entitled to a lien or a set-off in respect of the RM317,562.

By his affidavit in support of the originating summons, En. Vijendran explains that his firm had acted as solicitors and he as Counsel for the defendant in a number of civil suits from about June 1986. Particulars of the relevant suit numbers are given in the affidavit in support. Haji Ahmad Kamal bin Abdullah Al-Yafii, one of the receivers, admits that bills of costs in respect of these suits were rendered to the defendant between July 1987 and November 1987 the aggregate of which comes to some RM405,250. En. Vijendran in effect deposes that these bills appear to have been ignored by the bank. However after the instant originating summons

had been initiated, a settlement in respect of the quantum of these litigation bills was apparently arrived at between the plaintiff and the receivers in the sum of RM239,092. However, no agreement as to the right of the plaintiff to draw on the money held by them was arrived at.

En. Vijendran also deposes to having given professional opinions and advice to the defendant bank in respect of a number of matters in respect of which bills of costs were raised which apparently were also ignored. Haji Ahmad Kamal in his affidavit conceded that bills under this category of work were rendered between August 1986 and February 1987 totalling RM68,550. In his affidavit in reply to the application Haji Ahmad Kamal says that while the defendants are liable for fees for the work done they had at all material times disputed the quantum of the bills. However there was no evidence of any manifestation of such disputes. Counsel for the receivers had to concede that until the quantum of the bill was questioned by Haji Ahmad Kamal in his affidavit in reply affirmed on 7 April 1990, there appears to be no evidence that the bills had been disputed.

A 3rd category of work done by the plaintiffs was in the preparation of the relevant documentation and related work in respect of loans approved by the defendant co-operative bank in favour of certain members of the defendant namely one Che Ismail bin Che Wan, one Suhaimi bin Babjee, one Tan Kim Wah and one Mohd. Taib Ibrahim. Apparently in each of these cases the member concerned had approached the defendant bank for a loan. In each case the defendant bank having approved the application, had written to the plaintiff instructing them to prepare the relevant documentation for due execution by the lender and the borrower. Together with the instructions a copy of the letter of offer to the member concerned was sent to the plaintiff in each of which letters was stated that a term of the agreement for the loan would be that:

> All legal charge and expenses including the bank's solicitor-client cost incurred in documentation and collection of any outstandings are to be borne by you (that is, the member concerned).

In each of the letters giving instructions to the plaintiff, reference was made to the relevant letter of offer to the member and it was pointed out to the plaintiff that "All legal expenses in this respect will be borne by the member." By the letters of instruction in respect of Che Ismail bin Che Wan, Tan Kim Wah and Mohd. Taib Ibrahim the plaintiffs were further told that:

> The bank shall not be liable for any fees unpaid and due for any reason whatsoever on your taking instructions to document this loan facility.

This was not stated in the letter of instruction in respect of Suhaimi bin Babjee. The effect of this omission will be considered later in this judgment. The relevant loan documentation was apparently duly prepared by the plaintiff in respect of each of the aforesaid members and as instructed provisions were made in the loan agreement for the borrower to be responsible for all the fees payable in respect thereof. No doubt because of the term in the agreement in respect of the legal costs and because of what had been stated in the defendant's letters of instruction in respect of the fees for the work done, the plaintiff had raised bills against the relevant borrowers. However, they were not paid by any of them and when the plaintiff realised they were not going to be paid by the individual members, they raised bills for the work done against the defendant bank, one each in May 1985, April and August 1986 and the last one in December 1987. There is no evidence of the defendant disputing any of these bills on principle or on quantum. However none of the bills or any part of them was settled. The total of these loan documentation bills was RM163,597.25.

As to these bills the receivers' stand is that it having been made abundantly clear to the plaintiff that the borrowers were to be responsible for the fees involved, whether the defendant had disputed the bills or not is not relevant.

Now, Part IX of the Legal Profession Act 1976 provides the procedures for disputing a solicitor's bill of costs. The party chargeable or the person liable to pay the costs, if he disputes the bill, has to obtain by petition an order for the taxation of the bill. By s. 126(1) this has to be done within 6 months from the delivery of the bill. Section 128 provides that thereafter no order shall be made for taxation of a solicitor's bill of costs "except under special circumstances to be proved to the satisfaction of the Court". However s. 128(2) provides that in any event no order shall be made for the taxation after the expiry of one year from the delivery of the bill of costs.

Applying these sections, it is clear that neither the defendant nor the receivers are entitled at this late stage to dispute the quantum of the said bills in respect of the litigation (which quantum in any event has been settled at RM239,092). Similarly neither the defendant nor the receivers are entitled at this late stage to question the quantum of the bills amounting to RM68,550 in respect of opinion and advice.

As to the bills in respect of the work done on the loan documentation it is contended on behalf of the plaintiff that in spite of the term incorporated in the loan agreement for all the relevant fees to be paid by the borrower, and in spite of the defendant bank stating in its letters in which the said instructions were given to the plaintiff that the "bank will not be liable for any fees unpaid and due for any reason whatsoever", the plaintiff were entitled to bill the bank for the work done. The plaintiff relies on s. 42 of the Contracts Act. In my judgment on the facts the reliance on that section is based on a misconception of the section.

The plaintiff also relies on the submission that on a true construction of the instructions given to them in respect of the payment of the fees for the work done, if the relevant member fails to pay the relevant fees the plaintiff was entitled to recover the fees from the defendant since it was the defendant who had given the instructions to the plaintiff in respect of the work that was to be done and which was done.

In the context, the case of Suhaimi bin Babjee has to be looked at separately from the other 3 cases because of the difference in the instructions given in respect of legal expenses. In the case of Suhaimi bin Babjee the instructions were that "All legal expenses in this respect will be borne by the member". In the other 3 cases the bank having in it instructions to the plaintiff said exactly the same thing, went on to state:

> The bank shall not be liable for any fees unpaid and due for any reason whatsoever on your taking instruction do (to) document this loan facility.

This latter paragraph is omitted from the letter of instruction to the plaintiff in respect of the loan to Suhaimi bin Babjee. In my view, without the latter paragraph, what we have is the bank requiring the solicitors to get on with the work acting as the bank's solicitors with the instructions to include a term in the loan agreement that all the legal fees and expenses involved in respect of the loan would be paid by the borrower. There is, with the instruction, what amounts to an assurance to the solicitors that their fees "will be borne by the member". In the face of that it seems to me that where the solicitors had relied on the said assurance as they appeared to have done, they would be justified in proceeding and completing the documentation and billing the borrower members for the fees involved and in the event any such member refuses or fails to pay the fees the solicitors would be perfectly justified in

informing the bank that in spite of the assurance given by the bank that "the legal expenses ... will be borne by the member" the member has failed to bear the expenses. In the event the solicitors would be perfectly entitled to look to the bank to pay their fees for the work done which, as has been seen, was done on the instructions of the bank.

The inclusion of the said latter paragraph in the letter of instruction however throws a different complexion to the matter to the effect that the bank is saying that the position is that the legal expenses will be met by the borrower and the solicitors are to further take note that the bank "shall not be liable for any fees unpaid". This is as clear notice as one could expect to the solicitors to look for their fees **only** from the borrower and if they chose to undertake the job as they did, it must be assumed that they did it on the terms that they are **not** entitled to look to the bank for the legal fees.

Accordingly in my judgment the bill of costs in respect of the work done in respect of the loan to Suhaimi bin Babjee was properly raised against the bank. The bills in respect of the other 3 cases were not properly raised as against the bank and the bank was justified in ignoring them. The provisions of s. 126 and s. 128 of the Legal Profession Act 1976 have no relevance where the solicitor raises a bill that he was not entitled to raise. The provisions of these two sections, however, precluded the defendant and the receivers from questioning the quantum of bill raised in respect of the work done for the loan to Suhaimi bin Babjee. The amount is $9,956. Thus the amount which the bank and the receivers are not entitled to question amounts to RM317,598 which is the aggregate of the agreed amount of RM239,092 the said RM68,550 and the said RM9,956.

The defendant by the receivers have not only attempted to dispute the bills but also the right of the solicitors to draw as they did on the said RM317,562 standing to the credit of the defendant bank in the plaintiff's client account.

The plaintiffs rely on r. 7(a)(iv) of the Solicitors' Account Rules 1978 in support of their contention that the drawings made by them were in order. Alternatively they say that in any event r. 15 allowed them the right to draw the amount. The relevant portion of r. 7(a) (and of r. 7(b) which has also to be looked at) and r. 15 are as follows:

> 7. Drawing money from client account.
>
> There may be drawn from a client account:
>
> (a) in the case of client's money:
>
> (iv) money properly required for or towards payment of the solicitor's costs where a bill of costs or other written intimation of the amount of the costs incurred has been delivered to the client and the client has been notified that money held for him will be applied towards or in satisfaction of such costs.
>
> (b) in the case of trust money:
>
> (i) money properly required for a payment in the execution of the particular trust; and
>
> (ii) money to be transferred to a separate bank account kept solely for the money of the particular trust;
>
> 15. Right or recourse of a solicitor against moneys standing to the credit of a client account not affected by the rules. Nothing in these rules shall deprive a solicitor of any recourse or right, whether by way of lien, set-off, counterclaim, charge or otherwise, against moneys standing to the credit of a client account.

Counsel for the receivers contended that the whole of the money standing to the credit of the defendant in the plaintiff's client account was "trust money" to which r. 7(b) applies and that accordingly the purported application of the amount invoking r. 7(a)(iv) was not in order.

"Client's money" and "trust money" are defined in the rules as follows:

> 'client's money' means money held or received by a solicitor on account of a person for whom he is acting in relation to the holding or receipt of such money either as a solicitor or in connection with his practice as a solicitor, agent, bailee, stakeholder or in any other capacity; but the expression 'client's money' does not include:
>
> (a) money held or received on account of the trustees of a trust of which the solicitor is solicitor-trustee; or
>
> (b) money to which the only person entitled is the solicitor himself or, in the case of a firm of solicitors, one or more of the partners in the firm.
>
> 'Trust money' means money held or received by a solicitor which is not client's money and which is subject to a trust of which the solicitor is a trustee whether or not he is solicitor-trustee of such trust.

Thus money held in a solicitors' client account with a bank could, at least in theory, include money which is not "client's money" and if, and only if, such money (which is not client's money) is the subject of a trust does it come within the definition of "trust money". There are two ingredients: (1) it must not be "client's money" and (2) it must be the subject of a trust. If the money was "client's money" within the terms of the definition of that phrase in the rules, then even if it is the subject of a trust it is not "trust money" within the meaning of that phrase in the rules. If, however, the money was received on account of **trustees of** a trust of which the solicitor is solicitor-trustee, by the exclusion (a) to the definition of "client's money" such money, even though is held in the client account, is not "client's money".

I pause to note that it cannot but be that all money held in a client account of a solicitor (apart from money to which the only person entitled to it is the solicitor himself or in the case of a firm of solicitors, one or more of the partners in the firm) is money held in trust by the solicitor in the sense that he is not the beneficiary of the money. However the said exclusion (a) to the definition of "client's money" and the definition of "trust money" for the purposes of the rules have the effect, as has been seen, that for the purposes of the rules, only money which does not fall within the definition of "client's money" and which is subject to a trust is to be regarded as "trust money".

It has to be emphasised that it is only money held or received on **account of trustees of a trust of which the solicitor is solicitor trustee** that are excluded from what is defined as "client's money". If money even though held in trust is not excluded as aforesaid, because of the definition of "client's money" it will not come within the meaning of "trust money" as "trust money" is defined not to include "client's money".

As I understood it, the manner in which the RM319,562 came to be in the plaintiff's client account to the credit of the defendant bank was as follows:

The plaintiff acted as solicitors for a certain developer who owed the defendant bank substantial sums of money. Certain other clients of the plaintiff had entered into agreements with the developer for the purchase of houses to be built by the developer. These purchasers who were government servants had borrowed money from the loan division of the government for the purchase of the houses. The aggregate of the amounts lent to these various

purchasers was the RM317,562. This was paid to the plaintiff by the loan division to be paid to the developer towards the purchase price of the houses bought by the purchasers. At that stage clearly the plaintiffs held the money in trust to be paid to the developer. But it was not held or received on account of trustees of any trust. Accordingly it fell within the definition of "client's money".

The developer directed the plaintiffs to pay the RM317,562 to the defendant bank upon certain undertakings being given. These were duly provided whereupon the money was deemed to be held or received by the plaintiff on account of the defendant and it was clearly held or received as aforesaid in connection with the plaintiff's practice as solicitors within the meaning of the said definition of "client's money" in the Solicitors' Accounts Rules.

In any event it cannot but be that at that stage the amount stood as credited to the defendant in the plaintiff's client account within the terms of r. 15 of the said rules.

Our Solicitors Accounts Rules 1978, were adapted from the English Solicitors' Accounts Rules 1975 and the definitions of "client's money" and "trust money" in the English and the Malaysian rules are identical.

In the commentary in respect of the definitions of "client's money" and "trust money" in Vol. 2 of the *1979 White Book* para. 3759 has it that:

> Client's money is defined in terms which include in effect all money received by a solicitor on account of any person for whom he is acting as solicitor or, in connection with his practice, as agent, bailee, stakeholder or in any other capacity, that is to say, in general terms, practically all money received by a solicitor in connection with his practice which is not his own money.

At para. 3763 certain difficulties arising out of the definitions are noted (emphasis provided):

> Trust money - This is defined by r. 2 as money subject to a trust of which the solicitor is a trustee. There are many cases where a solicitor who is a trustee receives money in connection with the trust in circumstances in which **it is difficult** to determine forthwith upon receipt whether he receives the money in the capacity of solicitor, or in the capacity of trustee. The option afforded to him by r. 4 of paying this money into client account is designed to relieve the solicitor of the difficulty of determining on receipt whether or not the money is technically client's money. It should be observed that if the trustees of the trust to which the money is subject are the solicitor himself, or the solicitor and a partner, clerk or servant of his or more than one of such persons, the money cannot by definition be client's money. This is necessary to avoid a conflict with the Solicitor's Trust Accounts Rules. Nevertheless r. 4 enables a solicitor to pay money of which he is a solicitor-trustee **in this limited sense** into a client account if he so desires.

Applying the definitions to the facts of the instant case, the said amount, even if it may have been "trust money" when it was initially paid to the solicitors by the Government loan division (in all probability it was not), metamorphosised into "clients money" when it was deemed to be held to the credit of the defendant.

In any event as has been pointed out, r. 15 preserves the solicitors' right of recourse by way of lien, set-off, counterclaim, charge or otherwise against money standing to the credit of a client's account.

Accordingly even if the money paid in by the loan division to be paid to the developer became, on the instructions of the developer, money to be paid to the defendant and in spite of the metamorphosis continued to be trust money, the beneficiary of the money now being the defendant, the plaintiff had the right of recourse (in respect of the fees owed by

the defendant) by way of *inter alia* set-off against the money standing to the credit of the defendant. "Set-off" here is not to be limited to a set-off pleaded in a statement of defence but has reference to the right of setting off the amount owed against the amount held. In the context such setting off means the settling of the account between the parties and in my judgment can be implemented by drawing on the amount due as was done here.

One other matter that has to be dealt with is the effect of the appointment of the receivers and the order of the Court that gave directions to the receivers. The short answer to the problem is that the said appointment and the said order of Court, not being retrospective in effect, have no relevance to the issues herein in that they came into existence well after the drawings had been effected by the plaintiff.

Accordingly the plaintiff is entitled to the declarations sought in prayers (i) and (ii) of the originating summons. I also hold that in any event the plaintiff was, because of r. 15, entitled to set-off the amount owing by the defendant and that accordingly it was in order for the plaintiff to do so by drawing on the money held in the client account. The costs of and incidental to the application will be paid by the defendant.

Also found at [1991] 2 CLJ 1403